



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 542 OF 2011

IN THE MATTER OF THE ESTATE OF PETRO M' ITWAMWARI alias TWAMWARI NDEGWA (DECEASED)

ROISE KAJIRA M'ITWAMWARI..... PETITIONER

-VERSUS-

PAULO M'MUGUNA PETRO M'TOMWARI.....PROTESTOR

J U D G M E N T

1. **PETRO M'ITWAMWARI ("the deceased")** died on 27th July, 1991. He left behind two properties as his estate, namely, Ntima/Ntakira/126 and Nyaki/Giaki/1440. He also left behind several beneficiaries. On 26th September, 2011, Roise Kajira M'Itamwari ("the petitioner") petitioned for letters of administration of the estate of the deceased which were issued to her on 4th August, 2014.

2. On 11th October, 2016, she applied for the grant to be confirmed. In the application, she proposed to distribute the estate as follows:-

a) Ntima/Ntakira/126

- i) Jenniffer Mwari - ½ acre
- ii) Zephania Mworira - 1 acre
- iii) Lilian Kiunga - ½ acre
- iv) Daniel Kimaita - 1 acre
- v) Stephen Maingi - 1 acre
- vi) Margaret Wanja - ½ acre
- vii) Samuel Kathurima - 1 acre
- viii) Peter Muthuri - ¼ acre
- ix) John Kiogora - ¼ acre

b) Nyaki/Giaki/1440

- i) David Kairanya - 1 acre
- ii) Francis Kinyua - ½ acre
- iii) Norah Mukokinya - 1 acre (Roise Kajira to hold in trust)
- iv) Francis Kinyua - ½ acre
- v) Roise Kajira - 2 acres

3. On 15th March, 2017, Paulo M'Muguna Petro M'Tomwari ('the protestor') lodged a protest to the mode of distribution proposed by the petitioner. He contended, inter alia, that the mode of distribution of the estate as proposed by the petitioner was not fair for the reason that, the petitioner had not allocated him any share whereas he was a biological son of the deceased.
4. When the matter came up for hearing on 7th March 2017, the parties agreed by consent that the grant issued on 4th August 2014 to the petitioner, be revoked and a fresh one be issued to the petitioner jointly with the protestor. The court directed that the protest be determined by way of *viva voce* evidence.
5. The protestor's case was that the deceased was his father and that Roise Kajira was his step mother. That his father had not given him any land during his lifetime as the property he owned, Kiirua/Naari/Maitai /277, was given to him by the clan and that it never belonged to his father at any given time. That he was objecting to the proposed mode of distribution by the petitioner as he had not been provided for despite being a son of the deceased.
6. The protestor further testified that Peter Muthuri and John Kiogora, who had been allocated ¼ an acre each of land parcel No. Ntima/Ntakira/126, were not children of the deceased and therefore not entitled to a share of the deceased's estate and Further, that Norah Mukokinya, whom the petitioner had been allocated 1 acre on parcel No. Nyaki/Giaki/1440, was not a child of the deceased. That since the deceased had given the petitioner parcel No. Nyaki/Giaki/1441 measuring (5) five acres during his lifetime, she was not entitled to any share in the estate.
6. **RW1 Roise Kajira**, the Petitioner, testified that her late husband had gifted her land parcel No. Nyaki/Giaki/1441 while he was still alive for her to hold in trust for the five sons she had with him. That he had also gifted her land parcel No. Nyaki/Giaki/1441(sic) (should have been 1440) measuring 1.792 ha, for her to utilize with her daughters.
7. She further told the court that the deceased had shared his properties per household and all beneficiaries had extensively developed the portions of land that they occupied. That whilst her house was allocated parcel no. Nyaki/Giaki/1440, the 1st house of Charity M'Itwamwari was given Ntima/Ntakira/126. It was her testimony that because the protestor had always been a trouble maker in the family, the deceased had given him land at Naari which was far away from the rest of the family which was left at Ntakira and Giaki. That the protestor had taken away all the documents necessary for pursuing the deceased's pension and gratuity in furtherance of his own selfish ambitions to the detriment of the rest of the family.
8. **RW2 David Kimaita** testified that he was a son of the deceased born of his first wife Charity M'Itwamwari. That prior to his death, the deceased had come to his house in the company of the petitioner and his mother Charity M'Itwamwari and handed over to him title deeds to the estate properties because he had feared the protestor may deal with them in an illegal manner if he laid his hands on them. That because the protestor was a nuisance, the deceased had given him 4 of land acres at Naari and the rest of the family was left at Giaki and Ntakira, respectively.
9. **RW3 Stella Karimi** testified that she was the protestor's wife and had lived with him between 1965 and October 1968 when the protestor chased her away from their matrimonial home. That their union had been blessed with two sons namely, Peter Muthuri and John Kiogora. She told the court that prior to his demise, the deceased had gifted Peter Muthuri and John Kiogora ½ acre of land to be excised from Ntima/Ntakira/126 since the protestor had chased them away empty handed.
10. **RW4 Margaret Gakii** testified that she got married to the protestor in March 1970 and settled at Naari. They were blessed with 8 children. That they got separated in 1990. That in 1994, the protestor chased away their children from Naari and they joined her at her father's home where they have lived ever since. That in 1991, the deceased had summoned her and the protestor before the clan and told them that he would give Peter Muthuri and John Kiogora ½ an acre at Ntakira as the protestor had chased them empty handed.
11. **RW5 Juma Shabaan's** evidence was that he was a son of the deceased born of the late Charity M'Itwamwari. That initially he lived, got married and bore children while at Giaki but the deceased relocated him to Ntakira as the deceased had intended that each child should live where his/her mother was settled. That for that reason, he left the Giaki land (Nyaki/Giaki/1440) to the family of the Petitioner, Roise Kajira and shifted his family to Ntima/Ntakira/126. Which had been allocated to the family of his mother That the parcels of land at Ntakira and Giaki were clearly demarcated on the ground and that each beneficiary has been in occupation, use and had fully developed his portion since being settled by the deceased.
12. **RW6 Jennifer Mwari Muthuri**, daughter of the deceased born of Charity M' Itwamwari, testified that the protestor was born out of wedlock but her grandfather took care of him when he was young. That because the protestor was troublesome, the deceased gave him land far away from home at Naari. That the land at Ntakira was given to the children of the 1st house while the land at Giaki was given to the 2nd house of the petitioner. That because the protestor had chased away Peter Muthuri and John Kiogora, they should be given a share at Ntakira.
13. After trial, the parties filed their respective submissions which the court has carefully considered. The issues for determination are; ***whether the protestor is a beneficiary of the estate of the deceased; whether the deceased had settled his properties in his lifetime and; in the circumstances how the estate of the deceased should be distributed.***
14. The evidence on record is clear. It was not disputed that the deceased's family was polygamous. That he had two houses, the house of Charity M'Itwamwari and that of the petitioner. However, it came out that before the deceased was married to his said two wives, he already had a child from another woman. The protestor stated that his mother had been married to the deceased but the petitioner was of the view that the protestor was a child of the deceased born out of wedlock.
15. Whichever the case, there was no dispute that the protestor was a biological son of the deceased. In this regard, I hold and make a finding that the protestor is a beneficiary of the estate of the deceased.

16. The next issue is whether the deceased had settled his property during his lifetime and if so how? The parties were in agreement that the deceased had settled his property during his lifetime. The point of departure was, the manner in which he had effected the settlement.
17. According to the protestor, the deceased had settled his property in a clan meeting held on 13th June, 1987. That in accordance with that meeting, the protestor was to get 1.25 acres in Ntima/Ntakira/126. He sought to produce minutes that were purportedly taken during that meeting. He also testified that the deceased had gifted the petitioner Nyaki/Giaki/1441 measuring 1.792 ha and that for that reason, she was not entitled to any share of the estate. He testified that the land he owned at Naari, Kiirua/Naari-Maitei/277, was given to him by the clan and not the deceased.
18. On her part, the petitioner and her witnesses denied the protestor's version and told the court that, the deceased had settled his properties according to houses. That because the protestor was a troublesome person, he was removed from home in the 1960s and given land at Naari. That the deceased then settled the 1st house on Ntima/Ntakira/126 and the petitioner's house at Nyaki/Giaki/1440.
19. This court has evaluated the evidence on record. For reasons on record, the court rejected the production of the minutes of the alleged meeting that settled the deceased's property. The said minutes were a photocopy, they were not signed and were never endorsed by those allegedly in attendance. In any event, the protestor did not call any of the 21 people who allegedly attended the meeting to testify on his behalf even though he stated that some of them were still alive.
20. Further, it was not clear how the deceased would have settled his property at the alleged meeting by allocating the protestor 1.25 acres from Ntima/Ntakira/126 for the protestor now to claim 1 acre in his protest.
21. On the other hand, the testimony of the petitioner and her witnesses was consistent. That the deceased had settled his properties according to his two houses. That the protestor had long before been given his own land far away in Naari because the deceased considered him troublesome. That the beneficiaries were already settled in the respective properties as they had been settled by the deceased.
22. I carefully observed the witnesses testify. All the petitioner's witnesses were firm that the protestor was given his own land separately because he was considered a threat to the family peace. No less than two of the protestor's wives, **RW3** and **RW4**, told the court that the deceased gave the protestor land in Naari away from the family because of his conduct. That they lived and settled there with the protestor, bore and brought up children there. Indeed the belligerence demeanor of the protestor which the court observed of him while in the dock confirmed these allegations.
23. All the petitioner's witnesses were in agreement that the deceased had directed that two of the children of the protestor, Peter Muthuri and John Kiogora be given ¼ acre each from Ntima/Ntakira/126 because the protestor had chased them away. Indeed the protestor himself admitted in court that although the two were his own children, he was not prepared to give them any share in his land Kiirua/Naari-Maitei/277. Which he had already subdivided to give his other children. To my mind, the petitioner's testimony was not only consistent throughout, but remained firm and convincing. I believed her and her witnesses. I did not believe the protestor.
24. The contention that the clan gave the protestor Kiirua/Naari-Maitei/277 cannot hold. The protestor had initially sworn in his Further Affidavit Evidence sworn on 2nd May, 2017 that he had acquired that property through his own effort. He changed that position at the trial to claim that the clan had given him that property. It is not clear how the clan could have allocated a child land whilst his father was still alive. I accept the testimony of **RW6** that the deceased directed that the property be put in the name of the protestor during adjudication.
25. Accordingly, I am satisfied that the deceased settled his property during his lifetime. He gave the protestor Kiirua/Naari-Maitei/277 measuring 4 acres all for himself. In the year 1960s to get rid of him from home. He settled the family of Charity M'Itwamwari on Ntima/Ntakira/126 but directed that two of the protestor's sons be given a share thereon, and settled the petitioner's family on Nyaki/Giaki/1440. **RW3** and **RW4** were independent witnesses who stood to gain nothing from the evidence they offered.
26. Further, I accept the testimony of the petitioner that the deceased had given her Nyaki/Giaki/1441 to take care of his sons. That there was nothing wrong for her holding two acres in Nyaki/Giaki/1440 for her five daughters who were agreeable to that arrangement.
27. As regards Norah Mukokinya, the evidence tendered showed that she is a daughter of the late John Mwenda, a son of the deceased who was entitled to a share in the estate. Accordingly, there is nothing wrong in the petitioner allocating her the share that was meant for her late father.
28. In the circumstances, how should the estate be distributed? From the foregoing, I find that all the beneficiaries of the deceased are in agreement with the mode of distribution proposed by the petitioner except the protestor. Since the protestor was properly and fully provided for by the deceased during his lifetime, I find that he is not entitled to any share in the estate of the deceased. The mode of distribution proposed by the petitioner is fair, equitable and in terms of how the deceased had settled his family. I adopt the same. In addition, the pension and gratuity of the deceased is to be distributed to the petitioner being the only surviving widow of the deceased. The upshot is that the Protest is dismissed.
29. This being a family matter, there will be no order as to costs.

DATED and DELIVERED at Meru this 5th day of April, 2018.

A. MABEYA

JUDGE